Filed 10/20/04 P. v. Alvarez CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MARIO WALTER ALVAREZ et al., Defendants and Appellants.	B168170 (Los Angeles County Super. Ct. No. TA063948)

APPEALS from judgments of the Superior Court of Los Angeles County, Allen J. Webster, Judge. Modified and affirmed with directions.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Mario Walter Alvarez.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant Jose Luis Hernandez.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Paul M. Roadarmel, Jr., Deputy Attorney General, for Plaintiff and Respondent.

Mario Alvarez and Jose Hernandez appeal from judgments entered following a joint jury trial in which they were convicted of first degree murder and two counts of attempted premeditated murder, with further findings that defendants personally and intentionally discharged firearms and committed the offenses for the benefit of a criminal street gang. Alvarez was also convicted of possession of cocaine, possession of a firearm by a convicted felon, and felonious assault, and found to have suffered a prior felony conviction.

Hernandez contends that evidence of weapons found in Alvarez's residence was improperly admitted, Alvarez's extrajudicial statement should not have been admitted as to Hernandez, the prosecutor committed prejudicial misconduct in closing argument, and the trial court erred in instructing on efforts to suppress evidence. Alvarez contends the evidence was insufficient to support the gang enhancement. Both defendants claim various sentencing errors. They also join in each other's arguments as applicable. We correct and modify the judgments with respect to certain aspects of sentencing and affirm.

BACKGROUND

Tortilla Flats is an established Compton street gang that has been involved in criminal enterprises such as narcotics sales, robbery, and murder. Defendants are members of this gang. Fruit Town Pirus is a rival street gang. In the early evening hours of February 7, 2002, the father of Tortilla Flats member Luis Lozano was shot to death by a Fruit Town Piru. Tortilla Flats members, including defendant Alvarez, went to Lozano's house later that evening to comfort him and promised to avenge his father's death.

Around 9:30 the next evening, Jesus Cruz parked his car near some friends' house in Fruit Town Piru territory. A male and two females Cruz had recently met were in the car with Cruz. Two other male friends were in another car parked nearby. One of them got into Cruz's car to change his clothes. A pickup truck driven by a male Hispanic drove past. Two male Hispanics wearing hooded sweatshirts were in the bed of the truck. Someone yelled "T-Flats," following which the males in the truck bed started shooting

rifles in rapid-fire fashion. Shots were also fired from a different direction. The truck drove off, leaving one of the females dead. The other female and the male who had gotten into the car were wounded. Over 40 expended shell casings from three different firearms, including a Ruger Mini 14 rifle, were found at the scene. Shortly after the shooting, several firearms were brought to Lozano's house.

About a half-hour after the shooting, defendant Hernandez was admitted to a hospital in Lynwood for treatment of gunshot wounds. Hernandez told police he had been shot while being robbed by members of a Lynwood gang. Police who investigated the story were unable to locate any reports of shots fired in the area where Hernandez claimed the robbery had occurred.

On February 10, 2002, Alvarez told Lozano that three rifles had been used in a shooting in which three or four people had been "dropped." Law enforcement officials searched Lozano's house on February 18 and found several firearms, including a Ruger Mini 14 rifle that ballistics analysis later established had been fired at the murder scene. A search of Alvarez's residence on February 19 yielded several other firearms and a billy club, as well as 22.3 grams of cocaine. (Alvarez stipulated at trial to having previously been convicted of a felony.)

A pickup truck matching the description of the one used in the shooting was determined to be registered to the mother of Tortilla Flats member Eric Castillo. Castillo's mother told police that her son had borrowed the truck on February 8 and returned it with bullet holes. DNA analysis of dried blood found on the liner of the truck bed established that the blood belonged to Hernandez. DNA analysis of earplugs found inside the cab of the truck was inconclusive but could not rule out Alvarez.

Both Alvarez and Hernandez were interviewed by the police. Each denied involvement in the murder. By March 2002, both defendants were in custody. They were placed in the same room and their conversation was recorded. Hernandez discussed DNA analysis and the need to clean the truck. He stated: "Because, hey look, they're gonna try to get me though, that's for sure, fool. If the DNA — if the DNA comes back, fool — hey, the homie — hey, fool, you know the homies *(unintelligible)* because if they

didn't clean it . . . and if the blood is there, fool, that's fucked up, home — homies, you know, 'cause they had said they had cleaned it good with *(unintelligible)*. You should call Erick and let him know fool. 'Cause he probably find out, you know." In the same conversation, Hernandez questioned whether it could be proved that he is a member of Tortilla Flats.

Also in March 2002, Alvarez told cellmate Joseph Montes that there were "[s]ome Black people" whom "he lit . . . up with a Mini 14." (Fruit Town Pirus is an African-American gang; Tortilla Flats is Hispanic.) Montes was later suspected of having written a note to deputies containing Alvarez's statement. As a result, Alvarez and others assaulted Montes over a period of two days.

DISCUSSION

1. Evidence of Weapons Seized from Alvarez's House

Hernandez contends he was prejudiced by admission into evidence of the weapons found in the search of Alvarez's residence because these weapons were not connected with any of the casings found at the murder scene. We disagree.

The weapons seized from Alvarez's residence were relevant to charges that Alvarez was a convicted felon in possession of a firearm and that the cocaine found in his residence was possessed for the purpose of sale. (Alvarez was tried on a charge of possession of cocaine for the purpose of sale, and at trial an expert testified that the weapons in Alvarez's residence were a factor relevant to the charge. Alvarez was convicted of simple possession as a lesser included offense.)

Hernandez acknowledges that at trial he neither objected to evidence of these weapons nor requested that the evidence be limited to Alvarez, and on this basis Hernandez contends that his trial counsel rendered ineffective assistance. But given the relevance of the weapons to the charges against Hernandez, his claim of ineffective counsel must fail.

2. *Bruton*[1] Issue

At trial, Lozano testified that Alvarez said something "about *them* using three rifles" with which three or four people had been "dropped." Montes testified that when Alvarez spoke of the people who had been shot with the Ruger Mini 14 rifle, he said that "*we* lit 'em up." (Italics added.) Hernandez contends that this evidence violated *Bruton v. United States*, *supra*, 391 U.S. 123. We disagree.

Apart from Hernandez's failure to object to this testimony, we note *Richardson v. Marsh* (1987) 481 U.S. 200 [107 S.Ct. 1702] teaches that *Bruton*'s prohibition against admitting the confession of one defendant against another "extends only to confessions that are not only 'powerfully incriminating' but also 'facially incriminating' of the nondeclarant defendant. [Citation.]" (*People v. Fletcher* (1996) 13 Cal.4th 451, 455–456.) Although Alvarez's statements incriminated himself in a shooting that plainly involved accomplices, there was nothing in the statements that incriminated Hernandez or any other specific individual. As stated in *People v. Fletcher*, *supra*, 13 Cal.App.4th at page 456, "[t]he editing [of a codefendant's statement] will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the coparticipant designated in the confession by symbol or neutral pronoun." (See also *People v. Archer* (2000) 82 Cal.App.4th 1380, 1388 [codefendant's "statement was redacted to delete any mention of appellant by name, but appellant is unmistakably implicated in several aspects of the statement"].) Because no inference regarding the identity of a coparticipant may reasonably be drawn from Alvarez's statements, Hernandez's claim of *Bruton* error must be rejected.

3. Prosecutorial Misconduct

Hernandez contends that the prosecutor committed prejudicial misconduct in final argument. Again, we disagree.

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[1] *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620].

During the opening portion of final argument, the prosecutor stated he had been looking forward to seeing what Hernandez would say about the DNA evidence, commenting that Hernandez's counsel "tried to cross talk about" it. The prosecutor continued: "It's all about a smoke screen. That's what her job is to do everything she can to create to try to fabricate reasonable doubt in their minds." Hernandez objected. The trial court stated: "Ladies and gentlemen, argument of counsel is not evidence. Evidence is that which is either testified to or stipulated to. [¶] Okay. Proceed." The prosecutor continued: "Mud on a wall. Take some mud, throw it on the wall, call it reasonable doubt and hope it sticks. With one of you don't fall for that. [*Sic*.]"

In the final portion of the argument, the prosecutor stated that "if [Hernandez's counsel] could, if it would work for your [*sic*] client, she'd tell you the sun isn't [going to] come up today. That's your [*sic*] job." Hernandez again objected. The court stated: "Okay. Again, ladies and gentlemen, argument of counsel is not evidence. Evidence is that what is testified to or stipulated to. Okay. Everybody understand that? All right. Proceed."

Included within methods that have been held to constitute prosecutorial misconduct are personal attacks on the integrity of opposing counsel, such as occurred here. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) But unlike *People v. Herring* (1993) 20 Cal.App.4th 1066, 1076–1077, on which Hernandez relies, the comments of the prosecutor here did not imply that Hernandez had lied on instructions from counsel. And unlike *People v. Gaines* (1997) 54 Cal.App.4th 821, 825, on which Hernandez also relies, the prosecutor's comments did not present the jury with a condensed version of what the testimony of a potential defense witness who was not called might have been. Rather, the prosecutor here was focusing on the lack of evidence in support of the defense. (See *People v. Frye* (1998) 18 Cal.4th 894, 978.) More important, as in *People v. Hawthorne* (1992) 4 Cal.4th 43, 61, the portions of the prosecution's argument about which Hernandez complains were "relatively brief and, especially when viewed in context, hardly so inflammatory as to distract the jury from a thorough and reasoned evaluation of the evidence." In addition, the trial court twice admonished the jury to

focus on the evidence rather than the argument of counsel. Under these circumstances, there was no likelihood that the comments materially contributed to the verdicts. (*Ibid*.; see *People v. Ayala* (2000) 24 Cal.4th 243, 288.)

4. CALJIC No. 2.06

Based on statements made in the recorded jailhouse conversation between defendants, the prosecutor requested that the jury be instructed pursuant to CALJIC No. 2.06 (Efforts to Suppress Evidence). Defendants objected. The prosecutor argued that the instruction was appropriate at least with respect to Hernandez. The trial court ruled as follows: "It's rather thin, I really do . . . think so, but I guess you could stretch the statement "You need to call Eric and have him take care of it." I guess that can amount to effort to suppress evidence although it sounds rather thin to me. I can't imagine any great argument on that particular jury instruction, but I'll give it as to Hernandez only, but I think it's really, you know, almost as thin as cotton candy, but I'll give it."

Hernandez contends that because no evidence was introduced to show that the truck had been washed, the instruction should not have been given. We disagree.

CALJIC No. 2.06 instructs that an "attempt [to suppress evidence] may be considered by [the jury] as a circumstance tending to show a consciousness of guilt." Here, Hernandez's consciousness of guilt was amply demonstrated by concern, as manifested by Hernandez telling Alvarez to call Castillo to let Castillo know that the truck should be cleaned, that Hernandez's blood would be found in the truck (Hernandez had apparently been shot during the incident), and that DNA analysis of the blood would reveal that it belonged to Hernandez.

"To support an inference that the defendant attempted to suppress evidence, the record need not establish that the evidence actually was destroyed. [Citations.]" (*People v. Hart* (1999) 20 Cal.4th 546, 620–621.) Thus, although there was no showing that the truck was cleaned in an attempt to remove possible bloodstains, instruction pursuant to CALJIC No. 2.06 was proper.

5. Sufficiency of Gang Enhancement Evidence

Alvarez contends that the evidence was insufficient to establish the gang enhancement under Penal Code section 186.22. (All further section references are to the Pen. Code.) Once again, we disagree.

As pertinent to this case, section 186.22, subdivision (e) defines a "'pattern of criminal gang activity,'" which is a prerequisite to the enhancement, as being established when two or more offenses enumerated in the statute are "committed on separate occasions, or by two or more persons."

"The Legislature's use of the disjunctive 'or' in [section 186.22, subdivision (e)] indicates an intent to designate alternative ways of satisfying the statutory requirements. [Citations.] This language allows the prosecution the choice of proving the requisite 'pattern of criminal gang activity' by evidence of 'two or more' predicate offenses committed 'on separate occasions' *or* by evidence of such offenses committed 'by two or more persons' on the same occasion. Therefore, when the prosecution chooses to establish the requisite 'pattern' by evidence of 'two or more' predicate offenses committed on a single occasion by 'two or more persons,' it can . . . rely on evidence of the defendant's commission of the charged offense and the contemporaneous commission of a second predicate offense by a fellow gang member." (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10, fn. omitted.)

Here, two or more persons (codefendants Alvarez and Hernandez) committed predicate offenses (murder and attempted murder) on the same occasion. Accordingly, the gang enhancements were factually supported as to each defendant. (*People v. Loeun*, *supra*, 17 Cal.4th at pp. 9–10.)

6. Sentence on Gang Enhancements

Defendants were sentenced identically on the homicide offenses — 25 years to life for first degree murder (count 3 as to each defendant) and consecutive terms of 15 years to life for attempted premeditated murder (counts 4 and 5 as to each defendant). The court further imposed gun use enhancements of 25 years to life under section 12022.53, subdivision (d), and gang enhancements of 10 years under section 186.22,

subdivision (b)(1)(C), on counts 3, 4 and 5. Defendants contend that the 10-year gang enhancements were improper because they had been sentenced to determinate terms and that in any event section 654 barred imposition of the gang enhancements on counts 4 and 5. We find merit in the former contention (and therefore do not discuss the latter).

Section 186.22, subdivision (b)(1) states in pertinent part that, "[e]xcept as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] . . . [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." Subdivision (b)(5) provides in pertinent part that "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served."

Defendants assert that because their homicide offenses require imprisonment for life, section 186.22 only permits their eligible parole periods to be set at a minimum of 15 years and does not allow that a determinate enhancement also be imposed.[2] The Attorney General disagrees.

There is clear authority in support of defendants' position as to the attempted premeditated murder convictions. (*People v. Herrera* (2001) 88 Cal.App.4th 1353, 1365.) But as to first degree murder, appellate courts have taken different approaches,

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[2] The 25-year minimum for first degree murder is obviously greater than the minimum term of section 186.22. The statute's 15-year minimum for attempted premeditated murder was imposed on defendants, because absent the provisions of section 186.22, subdivision (b)(5), the sentence for this offense would be straight life without any minimum eligible parole period. (§ 664, subd. (a).)

with Division Five of the Second Appellate District supporting the Attorney General's position (*id*. at pp. 1364–1365) and other courts agreeing with defendants (see *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1237–1239; *People v. Harper* (2003) 109 Cal.App.4th 520, 527; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1465; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 485–486). The matter will ultimately be resolved by the Supreme Court. (*People v. Lopez*, review granted Nov. 12, 2003, S119294.)

We conclude that the better position is the one taken by the courts which have found that the plain language of section 186.22 does not permit enhancement with a term of 10 years for the crimes of murder and attempted premeditated murder. Accordingly, the 10-year enhancements imposed on counts 3, 4 and 5 will be stricken.

7. Alvarez's Prior Prison Term Enhancement

At sentencing, the trial court enhanced Alvarez's term for one prior conviction under section 667.5, subdivision (b), but stayed imposition of the enhancement. In the parties' original briefing to this court, Alvarez contended and the Attorney General conceded that, because an enhancement under section 667.5, subdivision (b) must be either imposed or stricken, the trial court erred in staying its imposition. Alvarez and the Attorney General also agreed that the appropriate remedy would be to remand the matter to allow the trial court to either strike or impose the enhancement.

The trial court's sentencing and the parties' briefing were based on the assumption that the section 667.5, subdivision (b) enhancement had been properly found against Alvarez. But in supplemental briefing invited by this court, the parties note that although Alvarez stipulated at trial to the existence of a prior conviction for purposes of the charge that he was a convicted felon in possession of a firearm, he did not stipulate to, nor was an evidentiary hearing conducted on, the section 667.5, subdivision (b) enhancement. Accordingly, no finding was ever made on the existence of the prior conviction under section 667.5, subdivision (b), which includes the elements that the defendant have served a prior prison term and remain free of custody for a period of five years.

The Attorney General argues that the lack of a specific finding is of no moment because the prosecutor failed to introduce evidence under section 667.5, subdivision (b)

solely because of Alvarez's stipulation. Alternatively, the Attorney General asserts that if the finding must be reversed, the allegation of the enhancement should be remanded for retrial.

We take a pragmatic approach. In this opinion, we affirm, among other terms, three consecutive life sentences imposed on Alvarez. We further note that the trial court has already expressed an opinion on the lack of importance of the one-year enhancement under section 667.5, subdivision (b) by staying its imposition. Under these circumstances, we conclude it is appropriate to put proceedings on this enhancement to rest by ordering that it be stricken.

8. Alvarez's *Blakely*[3] Issue

In addition to his convictions of first degree murder and two counts of attempted premeditated murder, Alvarez was convicted of possession of cocaine, possession of a firearm by a convicted felon, and felonious assault. At sentencing, the assault charge was selected as the principal determinate offense, and the trial court imposed the upper term of four years. In so doing, the trial court stated: "There really are no factors in mitigation. There are numerous factors in aggravation as to Alvarez. The crimes involved violence, great bodily injury, death, vicious, callous behavior. [¶] Mr. Alvarez was armed and personally used a weapon. The victims were vulnerable. He was convicted of multiple counts alleging violence and great bodily injuries, also drug counts as well as the manner in which the crimes were carried out, planning and sophistication. [¶] Mr. Alvarez has a prior history, also been involved with violent conduct and is a danger to society." The court then imposed consecutive one-third middle terms for Alvarez's convictions of possession of cocaine and possession of a firearm by a convicted felon.

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[3] *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531].

Alvarez contends that imposition of the upper term and consecutive sentences was improper under *Blakely v. Washington*, *supra*, ___ U.S. ___ [124 S.Ct. 2531]. The contention is unavailing.

In *Blakely*, the Supreme Court discussed its holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348] that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490 [120 S.Ct. at pp. 2362–2363].) The portion of the rule excepting prior convictions from the requirement that they be found true by the trier of fact has been construed broadly to apply not only to the fact of the prior conviction, but to the general issue of recidivism. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 222–223.)

Here, Alvarez's probation report reflected that, as a juvenile in the early 1990's, petitions were sustained against him for grand theft and he was placed in the California Youth Authority. As an adult, Alvarez sustained multiple felony convictions for theft offenses and for carrying a concealed weapon. He had violated grants of probation and had violated parole from his state prison sentences.

Assuming for purposes of this opinion that *Blakely* applies to California's sentencing scheme and that Alvarez is entitled to have this court reach the merits of his argument, he is not entitled to relief. Under California law, "[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492; see also *People v. Osband* (1996) 13 Cal.4th 622, 728.) A single factor in aggravation is sufficient to support imposition of an upper term. (*People v. Osband*, *supra*, 13 Cal.4th at p. 728; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) On this record, it is not reasonably probable that a lesser sentence would have been imposed had the trial court considered only those factors related to Alvarez's recidivism. Accordingly, he is not entitled to any relief based on *Blakely*.

9. Hernandez's Presentence Custody Credits

At sentencing, the trial court stated that it was awarding Hernandez "credit for 465 days actual [and] 70 days credit for good time/work time for a total of 535 days." This credit award does not appear in either the minute order of that day's proceedings or in the abstract of judgment. Hernandez contends, and the Attorney General aptly concedes, that the abstract of judgment should be corrected to reflect the credit award. We shall order that the abstract be so corrected.

DISPOSITION

With respect to defendant Alvarez, the enhancement under Penal Code section 667.5, subdivision (b), is stricken. With respect to defendant Hernandez, the abstract of judgment is to be corrected to reflect 535 days of pretrial custody credit, comprised of 465 days of actual time and 70 days of conduct credit. With respect to both defendants, the 10-year enhancements under Penal Code Section 186.22, subdivision (b), imposed on counts 3 (first degree murder), 4 (attempted premeditated murder) and 5 (attempted premeditated murder), are stricken. The trial court is ordered to forward amended abstracts of judgment reflecting these changes to the Department of Corrections.

As modified, the judgments are affirmed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

ORTEGA, J.

VOGEL, J.